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AND TRADEMARK OFFICE

**Paper:** Request for Reconsideration dated April 10, 2006 Transmittal Letter (w/Express Mail Service); Request for Reconsideration dated April 10, 2006, Concerning Decision on Petition dated February 9, 2006; Copy of Petition under 37 C.F.R. § 1.378(b) For Acceptance of Delayed Payment of Maintenance Fee in Expired Patent to Reinstate Patent dated July 8, 2005; Copy of Declaration of Declaration of Rolin F. Barrett, Jr.; Copy of Declaration of Edna Walsh; Copy of Declaration of John G. Mills, III; Copy of Declaration of Larry L. Coats; Copy of Petition Fee under 37 C.F.R. § 1.17(f), (g) and (h) Transmittal (in duplicate); Return Postcard all via Express Mail No. EV146 601 684US

**Applicant(s):** Rolin F. Barrett, Jr.

**Title:** GUIDED BULLET

**U.S Patent No.:** 5,788,178

**Serial No.:** 08/888,425

**Docket No.:** RBAR0001-100

**Date Sent:** April 10, 2006

**Issued:** August 4, 1998

**Filed:** July 7, 1997

Michael A. Patané/Hope Graves

EV146601684US

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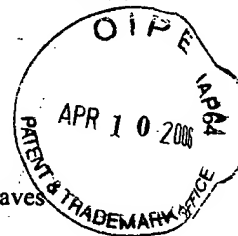
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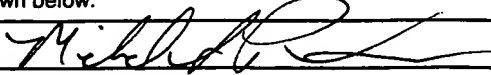
Michael A. Patané/Hope Graves



<b>TRANSMITTAL FORM</b>  (to be used for all correspondence after initial filing)		Patent Number	5,788,178
		Issue Date	August 4, 1998
		Application Number	08/888,425
		Filing Date	July 7, 1997
		First Named Inventor	Rolin F. Barrett, Jr.
Total Number of Papers in This Submission	Six	Attorney Docket Number	RBAR0001-100

ENCLOSURES (check all that apply)		
<input type="checkbox"/> Fee Transmittal Form <input type="checkbox"/> Fee Attached <input checked="" type="checkbox"/> Request for Reconsideration of Decision on Petition dated February 9, 2006 <input type="checkbox"/> After Final <input type="checkbox"/> Affidavits/declaration(s) <input type="checkbox"/> Extension of Time Request <input type="checkbox"/> Express Abandonment Request <input type="checkbox"/> Information Disclosure Statement <input type="checkbox"/> Certified Copy of Priority Document(s) <input type="checkbox"/> Reply to Missing Parts/Incomplete Application <input type="checkbox"/> Reply to Missing Parts under 37 CFR 1.52 or 1.53	<input type="checkbox"/> Drawing(s) <input type="checkbox"/> Licensing-related Papers <input checked="" type="checkbox"/> Copy of Petition under 37 C.F.R. § 1.378(b) For Acceptance of Delayed Payment of Maintenance Fee in Expired Patent to Reinstate Patent <input type="checkbox"/> Petition to Convert to a Provisional Application <input type="checkbox"/> Power of Attorney, Revocation Change of Correspondence Address <input type="checkbox"/> Terminal Disclaimer <input type="checkbox"/> Request for Refund <input type="checkbox"/> CD, Number of CD(s) _____ <input type="checkbox"/> Landscape Table on CD	<input type="checkbox"/> After Allowance Communication to TC <input type="checkbox"/> Appeal Communication to Board of Appeals and Interferences <input type="checkbox"/> Appeal Communication to TC (Appeal Notice, Brief, Reply Brief) <input type="checkbox"/> Proprietary Information <input type="checkbox"/> Status Letter <input checked="" type="checkbox"/> Other Enclosure(s) (please identify below): - Copy of Declaration of Rolin F. Barrett, Jr. - Copy of Declaration of Edna Walsh - Copy of Declaration of John G. Mills, II - Copy of Declaration of Larry L. Coats
<b>Remarks</b> EXPRESS MAIL LABEL NO.: EV146 601 684US DATE OF DEPOSIT: April 10, 2006		

SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT			
Firm	Cozen O'Connor, P.C.		
Signature			
Printed Name	Michael A. Patané		
Date	April 10, 2006	Reg. No.	42,982

CERTIFICATE OF TRANSMISSION/MAILING			
I hereby certify that this correspondence is being deposited, via Express Mail Service, with the United States Postal Service with sufficient postage in an envelope addressed to: Mail Stop Petition, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on the date shown below.			
Signature			
Typed or printed name	Michael A. Patané	Date	April 10, 2006

This collection of information is required by 37 CFR 1.5. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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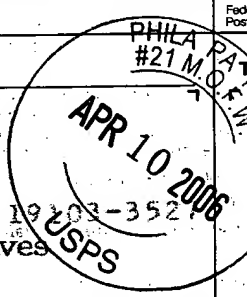
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<b>FROM: (PLEASE PRINT)</b> COZEN D'CONNOR 1900 MARKET ST FL 1 ATRIUM PHILADELPHIA PA 19103-3527 Michael A. Paskane/Hope Graves RBAR0001-100 (165406.000)				<b>TO: (PLEASE PRINT)</b> MAIL STOP PETITION U.S. Patent and Trademark Office Commissioner for Patent P.O. Box 1450 Alexandria, VA 22313-1450			



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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

<b>In re US Pat. No.:</b>	<b>5,788,178</b>	<b>Serial No.:</b>	<b>08/888,425</b>
<b>Issued:</b>	<b>August 4, 1998</b>	<b>Filed:</b>	<b>July 7, 1997</b>
<b>Patentee:</b>	<b>Rolin F. Barrett, Jr.</b>	<b>Docket No.:</b>	<b>RBAR0001-100</b>
<b>For:</b>	<b>GUIDED BULLET</b>		

**MAIL STOP PETITION**  
**Commissioner for Patents**  
**P.O. Box 1450**  
**Alexandria, VA 22313-1450**

**VIA EXPRESS MAIL LABEL NO: EV146 601 684US**  
**DATE SENT: April 10, 2006**

**REQUEST FOR RECONSIDERATION**

**SIR:**

Petitioner hereby respectfully requests reconsideration of the August 8, 2005 Petition to reinstate of U.S. Patent No. 5,788,178 entitled GUIDED BULLET, issued to Rolin F. BARRETT, Jr. on August 4, 1998. U.S. Patent No. 5,788,178 (the 178 Patent) was abandoned on August 5, 2002 for failure to pay the fourth year maintenance fee. Because more than twenty-four months have passed since the expiration, the petition was filed under 37 C.F.R. § 1.378(b).

Petitioner respectfully asserts the original petition is grantable under 37 C.F.R. § 1.378(b).

**Second Maintenance Fee Now Due**

Applicants hereby petition, in the event that upon Reconsideration the original petition is granted, for acceptance of an unavoidably delayed payment of the second maintenance for which the payment window closed during the time it took to the Office to make a decision on the original petition. With respect to the second maintenance fee, Patentee respectfully asserts that such delayed payment is unavoidable, since under current status, the patent is expired and no maintenance fee is therefore due. Only upon acceptance of the first maintenance fee, can Patentee pay the second maintenance fee. Accordingly, Patentee respectfully requests favorable

action upon the original petition and acceptance of the payment of the second maintenance fee. The Commissioner is hereby authorized to charge any fee or underpayment thereof or credit any overpayment to deposit account no. 50-1275, including the Petitions Fee(s), surcharge, and maintenance fees.

#### The Decision on the Petition

For reasons unknown to Patentee, a response to the original Petition was mailed seven months after the filing of the Petition, despite several telephone inquiries by Patentee's undersigned attorney, where the Office indicated a response was forthcoming. Apparently, the Petition was misfiled and not docketed, despite the prior telephone discussions, until attorney Cliff Congo tracked it down and took immediate action in February 2006. We express our appreciation to Mr. Congo for tracking down the case and taking prompt action.

Patentee respectfully asserts that this type of Office delay should be a factor to be weighed when considering this request for reconsideration. Indeed, were the Office petitioning, such misfiling would appear to be "unavoidable" in the sense that it is an unexpected error on the part of ordinary and trustworthy agencies such as the Office's worthy and reliable employees.

The crux of the decision appears to lie in the statement "Petitioner is bound by any errors or negligence that may have been committed by his voluntarily chosen counsel. See Link v. Wabash, 370 U.S. 626. 633-34 (1962)." Patentee notes, however, that according to 35 U.S.C. § 41(c)(1) the Director may accept late payment if "the delay is shown to the satisfaction of the Director to have been . . . unavoidable." (emphasis added.) Thus, the Director is free to distinguish this case.

Patentee notes that the Link case is quite different procedurally and substantively from the present circumstances. In Link, the court concluded "It was certainly within the bounds of permissible discretion for the court to conclude that the telephone excuse offered by petitioner's counsel was inadequate to explain his failure to attend. And it could reasonably be inferred from his absence, as well as from the drawn-out history of the litigation that petitioner had been deliberately proceeding in dilatory fashion." (p. 633, internal notations omitted.) In Link, the

court's conclusion, at least in part, appears to take into account the fact that counsel had *deliberately* undertaken its ill behavior, and it was not an isolated event. In the present case, counsel's actions were not deliberately taken to cause delay or for any illicit purpose. Instead, error arose without any illicit intent.

Patentee respectfully asserts that in the present context, the decision to accept the petition is made on a "case-by-case basis" as properly recited in the Decision. Applicants also note that according to 35 U.S.C. § 41(c)(1) the Director may accept late payment if "the delay is shown to the satisfaction of the Director to have been . . . unavoidable." Thus, the Director is free to distinguish this case, where Patentee and his counsel have not actively or deliberately sought to interfere with the normal course of patent prosecution or any other proceeding, as in Link. Here, through the unexpected and unforeseen fault of ordinarily trustworthy agencies, the maintenance fee was not paid. Through the years, the Office has established the meaning of "unavoidable delay" such that any decision based thereon should not be generalized to the holding of Link or other similar cases. Each decision should be made on a case-by-case basis, keeping in mind the standard of "unavoidable delay" established through prior decisions by the Commissioner and the courts, which appear to distinguish these circumstances from those of Link.

The Decision, on page 4 cites In re Patent No. 4,409,763; 7 USPQ2d 1798(ComrPats 1988) as indicating that the "unavoidable" delay standard requires a showing of the steps taken to ensure the timely payment of the maintenance fee, and that Patentee's reissue application is not evidence of such steps. In re Patent No. 4,409,763, cites many of the same cases as the Decision. However, the In re Patent No. 4,409,763 decision also notes " 'Unavoidable delay' must be decided on a 'case-by-case basis', taking all of the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). The standard for "unavoidable delay" is the "reasonably prudent person" standard. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887); In re Mattullath, 38 App.D.C. 497, 514-515 (D.C. Cir. 1912)." (emphasis added.)

As pointed out by Patentee in the Original Petition and by the Office on page 3 of the Decision, the Commissioner has defined the standard, in light of the "reasonably prudent person" standard to include

[The word "unavoidable"] is applicable to ordinary human affairs, and requires no more or greater care than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

(see Patentee's original Petition and page 3 of the Decision on Petition; emphasis added.) It is this standard, established by prior decision, that applies to decisions concerning the "unavoidable" standard in patent cases.

Here, Patentee respectfully asserts that in hiring the Mills Firm, a patent boutique, he exercised the care generally used by prudent and careful men in their most important business. Indeed, the Mills Firm had successfully prepared and prosecuted the application to issuance of the 178 patent and, being a patent boutique, no doubt had handled the payment of numerous maintenance fees and other patent office procedures. The Mills Firm, in turn exercised the same level of care, by using the ordinary and trustworthy agencies of reliable employees to attend to securing instructions with regard to payment of the maintenance fee. Nevertheless, through unexpected and unforeseen imperfection, the letters to Patentee, Rolin Barrett, Jr., were inadvertently forwarded to the wrong addressee – due in part to confusingly similar names. The letters were sent to Ronald Barrett rather than Rolin Barrett. As detailed in the previously filed Petition and accompanying Declarations, (copies of which are attached) the unexpected and unforeseen imperfection occurred because the confusingly similar names and associated addresses were both properly related to the file pertaining to the patent in question. Due to inadvertent clerical error in addressing the letters, the letters regarding the maintenance fee and subsequent abandonment were never sent to nor received by Patentee. This error arose through the use of ordinary and trustworthy agencies, particularly worthy and reliable counsel and their employees, and thus clearly falls under the definition of "unavoidable delay". Mr. Ronald Barrett did not help matters, since he never returned any of the letters to the Mills Firm. Thus, the Mills Firm never had any indication that their letters were not received by Patentee.

Were it not for the failure in these ordinary and normally trustworthy agencies, Patentee would have timely received notice of the due dates for the maintenance fees and would have been able to provide appropriate instructions to pay the maintenance fee (which instructions clearly would have been given, in light of the then pending reissue application). In light of the error, it was unavoidable that Patentee would not issue such instructions. It is clear from the quoted standard for "unavoidable delay" that the actions, i.e. misaddressed mail, of Patentee's former counsel led to unavoidable delay since Patentee and the Mills Firm both relied upon ordinary and trustworthy agencies, including worthy and reliable employees, to attend to payment of the maintenance fees, which necessarily begins with seeking instructions with regard to the maintenance fees. It was only through unforeseeable and unexpected error that the instructions were not obtained and the maintenance fee was not paid. For this reason, all that remains to be shown is that "all other conditions of promptness in its rectification [are] present."

As stated in the original Petition, the first indication Patentee had that the 178 patent was abandoned was in a telephone conversation between new counsel (the Coats Firm) and the reissue examiner who indicated the 178 patent had been abandoned for failure to pay maintenance fees. This was after years of prosecution at reissue, and only upon indication of allowance of the reissue application. Upon learning this, Patentee began the process of ferreting out information and obtaining the Declarations from appropriate persons in preparation of filing the original Petition. Patentee also sought the advice of present counsel to ensure an impartial review of the facts. Since these events happened a number of years ago, this process was not the easiest of tasks. Nevertheless, Patentee obtained what we believe is a fair statement of the facts, declarations from those with direct knowledge of the cause of the delay, and clearly indicates that not only was the non-payment of the maintenance fee not intentional, but it was unavoidable, in the sense that it resulted from the breakdown in the ordinary and trustworthy agencies used by Patentee and its counsel.

To deny Patentee's Petition will deprive him of not only his original patent, but also of his hard fought reissue application which has been indicated as allowable. Unlike the Link case, where opposing counsel had apparently diligently and routinely prepared for court only to be stymied by the delinquency of his opponent, here there is no opposed party that would be injured



by granting Patentee's position and accepting the late payment of the maintenance fees. Equity and fairness, if nothing else, favor granting this Petition.

The Commissioner in defining "avoidable" has provided for favorable treatment of this, and other cases, where inadvertent error by normally competent counsel and their employees, is properly "unavoidable." Thus, Patentee respectfully asserts that the delay involved in the present case is "unavoidable" as defined previously by the Commissioner. Accordingly, favorable action on this request for reconsideration is respectfully requested.

The Commissioner is hereby authorized to charge any fee or underpayment thereof or credit any overpayment to deposit account no. 50-1275, including the Petitions Fee(s), surcharge, and maintenance fees and any fee necessary to grant this Petition and reinstate the 178 Patent.

Petitioner respectfully submits that all requirements of 37 C.F.R. § 1.378(b) have been met and that there is clear evidence that the failure to pay the fourth-year maintenance fee was unavoidable. Accordingly, acceptance of late payment of the fourth-year maintenance fee and reinstatement of the 178 Patent is respectfully requested.

The Commissioner is respectfully requested to contact the attorney below if he believes it will facilitate the granting of this petition.

Respectfully submitted,

COZEN O'CONNOR, P.C.



Date: April 10, 2006

by: Michael A. Patané  
Reg. No. 42,982

1900 Market Street, 5<sup>th</sup> Floor  
Philadelphia, PA 19103-3508  
215-665-6966 – Telephone  
215-701-2080 - Facsimile